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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: PREGIUM RESOURCES INC.
4 SECURITIES LITIGATION

13 CV 7552 (VSB)

5 -----x

New York, N.Y.
6 April 23, 2014
7 2:30 p.m.

Before:

8 HON. VERNON S. BRODERICK

9 District Judge

10 APPEARANCES

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E4nQpreC

(In open court; case called)

THE DEPUTY CLERK: Counsel, state your name for the record.

MR. LIEBERMAN: Good afternoon, your Honor. Jeremy Lieberman from Pomerantz firm on behalf of lead plaintiffs.

THE COURT: Good afternoon.

MS. CARINO: Michelle Carino, also from the Pomerantz firm.

MR. ROSEN: Lawrence Rosen from Rosen Law Firm for lead plaintiffs.

MR. KEHOE: John Kehoe on behalf of additional plaintiff Michael Yeo.

MR. KRAMER: Your, Honor Daniel Kramer from Paul Weiss for the defendants. With me is my partner Bill Michael.

THE COURT: Good afternoon. You may be seated.

I will leave it up to counsel, but for purposes of this proceeding, you don't feel you need you have to stand necessarily to address the Court, but since we are all trained to do that, I can understand if you are creatures of habit and do that. Just so you don't get out of the habit because the next courtroom you're in, the rules may be a little different.

Let me just review for the parties the materials I have for today's conference, which is a premotion conference.

I have the April 9, 2014 letter from Mr. Kramer. I have the April 14 letter from the defense. Am I correct? Was

E4nQpreC

1 that on behalf of both the individual plaintiffs and -- I don't
2 know who it was from, the Rosen Law Firm.

3 MR. LIEBERMAN: Your Honor, the April 14 letter is
4 from the Rosen Law Firm on behalf of plaintiffs, and
5 Mr. Kramer's letter was on behalf of the defendants.

6 THE COURT: Was there any other material submitted in
7 connection with today's appearance?

8 MR. KRAMER: I don't think so, your Honor.

9 THE COURT: Let me sort of explain the way I would
10 like to proceed. I have some questions. Some of them are
11 factually related; some of them are legal. Some of them I
12 don't necessarily expect answers from you today, but to the
13 extent that briefing is going to go forward, and it does appear
14 there is going to be some form of briefing going forward, some
15 of questions I would like you to think about addressing in your
16 papers because there are questions that came to my mind as I
17 was reviewing the letters and the complaint itself.

18 Since this case was transferred to me, I just want to
19 review something so I have a complete understanding
20 procedurally where the case stands. My understanding is that
21 there had been several complaints and that there was a
22 consolidated amended complaint that was filed which is the
23 complaint that currently are the subject of the premotion
24 letters. Is that correct?

25 MR. LIEBERMAN: That's correct, your Honor.

E4nQpreC

1 THE COURT: One of the purposes for my premotion
2 letter, especially in the motion to dismiss context, is to
3 provide the plaintiff with an opportunity -- I'm saying this,
4 you do get a chance to amend. If Mr. Kramer once he puts in
5 his papers, and you respond, and once I decide the motion -- I
6 would say I'm giving you an opportunity once Mr. Kramer puts in
7 his papers, and if you need more time to consider that and you
8 put in your papers, that's fine; but once I actually decide the
9 motion, the issues that he has raised are the issues that are
10 raised, and in order for you to then seek leave to amend, you
11 would have to come up with good cause, and good cause being
12 something that occurred between the time of the filing of the
13 motion and the time of my decision that would cause you to be
14 able to amend your complaint.

15 In other words, this is an opportunity, I think --
16 obviously, I am not asking you to do that on the basis of a
17 three-page letter, but I imagine that the briefing will outline
18 all of the deficiencies the defendant believes are in the
19 complaint. You may disagree with that, which is fine, in which
20 case we will brief it, and I will render a decision.

21 I just wanted to let you know, or put you on notice,
22 so to speak, that that is the way I view this process because I
23 don't want to waste your time in waiting for a decision, and,
24 quite frankly, the judicial resources if where we are going to
25 end up is you are going to move to amend and we're going to

E4nQpreC

1 have an amendment.

2 MR. LIEBERMAN: I understand that, your Honor. It
3 sounds like we will get the motion papers to first see if
4 that's appropriate. Based upon the current letter, that is
5 really--

6 THE COURT: Yes. Again, I guess I could say I'd base
7 it on a three-page letter, but that wouldn't seem to me to be
8 logical; but, yes, you will have an opportunity to do that.
9 Take both my comments and then the argument of counsel today
10 and the back-and-forth for both parties to decide how to
11 structure your arguments going forward.

12 There is a legal question I have, and I don't know the
13 answer to this. Mr. Kramer, in your letter, you indicate that
14 many or most of the statements are opinions, and you also
15 mention forward-looking statements. I haven't had an
16 opportunity to look at the difference necessarily between a
17 forward-looking statement and an opinion and whether as a legal
18 matter there is a difference.

19 Mr. Kramer?

20 MR. KRAMER: I apologize. I have a hard time
21 addressing the Court sitting down.

22 THE COURT: That's fine.

23 MR. KRAMER: So I apologize.

24 There is a difference. Just very briefly, matters of
25 opinions or estimates, the Second Circuit in the case of a

E4nQpreC

1 called Fait talked about estimates and spoke a bit about how
2 courts ought to address them in this context. So, here, the
3 statements at issue principally are estimates about how much
4 gold is in the ground, right? And what the Second Circuit said
5 with respect to estimates in Fait is that in order to plead a
6 claim as to an estimate, a securities fraud claim in this case,
7 you have to have both objective and subjective falsity. So the
8 estimate must be objectively wrong. They have to allege facts
9 from which the Court could find that they've alleged that the
10 estimate about how much gold was in the ground was wrong.

11 But also because it's a statement of estimate and
12 opinion, they also have to allege subjective falsity. It's not
13 enough that the statement turned out to be false, but the
14 speaker must have believed it was false at the time because
15 that's a difference between an opinion being wrong and an
16 opinion being fraudulent. So, when we talk about estimates or
17 opinions, I would say that Fait governs, and that's the legal
18 rubric.

19 However, statements, regular statements, statements of
20 opinion, whatever, can also be forward-looking statements.
21 They can speak to something in the future. With respect to
22 that, there is a whole other regime from the PSLRA that
23 applies; and for our purposes what I think is important is that
24 when you think about scienter or intent that plaintiffs have to
25 allege with respect to a forward-looking statement, if your

E4nQpreC

1 Honor were to find that a statement was a forward-looking
2 statement, then what they would have to plead and eventually
3 prove is that there was actual knowledge that the statement was
4 false; not just recklessness, as can be proven for some
5 statements, but actual knowledge of falsity.

6 And sometimes -- and in this case, it's our position,
7 you will have statements of estimate that are forward-looking
8 statements. So we would say plaintiffs are going to be put to
9 the burden of Fait, objective and subjective falsity --

10 THE COURT: Yes.

11 MR. KRAMER: -- and also on the scienter grounds have
12 to show actual intent to defraud.

13 THE COURT: Thank you. That was helpful. So,
14 forward-looking and opinions with regard to some of the
15 statements, it sounds like that you are alleging that the
16 plaintiff will have to be put to its burden.

17 With regard to that, you know, specifically with
18 regard to scienter, and I get when Strathcona arguably begins
19 making noises about whether it be called red flags or whether
20 you call it warnings, whatever you might say, that there's a
21 disagreement that arises. I understand sort of that part of
22 the complaint. I think Mr. Kramer has pointed out that he
23 believes that at best that date is around January of 2013, I
24 believe. June. Sorry

25 MR. KRAMER: Correct.

E4nQpreC

1 THE COURT: January Strathcona was retained.

2 MR. KRAMER: Correct.

3 THE COURT: June is when he mentions that he believes
4 that that's the earliest.

5 Let me ask, before I ask plaintiff's counsel,
6 Mr. Kramer, I have a question with regard to June. I don't see
7 a specific allegation that says June 2013 in the complaint.
8 There is a May allegation at paragraph 46.

9 MR. KRAMER: Right.

10 THE COURT: That speaks in terms of that drilling was
11 about to start or something like that.

12 MR. KRAMER: Correct.

13 THE COURT: So how do you get June?

14 MR. KRAMER: So, that's correct. I think the gravamen
15 of plaintiff's complaint here is that there was a dispute
16 between these two experts, and the nature of that dispute
17 should have caused the defendants to realize that the estimate
18 was wrong and have to make disclosures. I think that is
19 seniority of the gravamen of the claim.

20 Your Honor is correct that the first expert is
21 Snowden. They're the ones that do the estimate. The second
22 expert that is brought in is Strathcona. Strathcona is hired
23 January 2013, and they're hired to do bulk sampling.

24 The complaint alleges that they did their first drill
25 in May. In fact, the document that the complaint relies on for

E4nQpreC

1 that makes it clear it's May 28, 2013. Your Honor, in
2 connection with the motion to dismiss, you can take notice not
3 just of the allegations in the complaint but all documents that
4 the complaint refers to and documents filed with the SEC. So,
5 in our motion to dismiss, we will show you the document that
6 the complaint refers to for the May date, and the first hole is
7 drilled May 28.

8 The allegation is it's the results from that drilling
9 that eventually leads Strathcona to believe that the Snowden
10 estimate is incorrect. So what we say to the Court is, OK, as
11 one issue, if, in fact, it's this dispute between Strathcona
12 and Snowden that is supposed to put my client on notice that
13 there's an issue, that dispute at the earliest could not have
14 been before June 2013 because the first drill hole was May 28,
15 and they didn't have any even preliminary results before the
16 first drill hole. So, that means, by necessity, it's after
17 May 28. And that's just the first drill. The bulk sampling
18 goes on and on; they do a lot of work.

19 So, plaintiffs don't allege precisely when the dispute
20 arose. They don't allege precisely when my client is supposed
21 to be on notice of it, but it can't be before June 2013 because
22 the work hadn't even started yet, and my client discloses the
23 resignation and the nature of the dispute in October.

24 So, one of the issues for the Court, we believe, is
25 can you really have a securities fraud case where the issue

E4nQpreC

1 that is supposed to put defendants on notice that there may be
2 some problem only arises at June or later -- they don't allege
3 when -- and the disclosure is in October. The securities laws
4 permit defendants a certain amount of time to analyze and react
5 to what they claim are red flags and disclose.

6 So, we think there is no claim there. We think there
7 is no scienter, but even if there were a claim, it's a claim of
8 only several months. That's what we have here. That is what
9 our argument will be.

10 THE COURT: Mr. Lieberman, I will give you an
11 opportunity. Obviously, Mr. Kramer has characterized the
12 complaint in one way. Basically, the dispute between -- again,
13 I am not saying that -- I am using the words the dispute
14 between the two experts Snowden and Strathcona. Is there
15 something more in there that you believe the complaint
16 contains?

17 MR. LIEBERMAN: Well, your Honor, there's also
18 allegations that even as early as November 2012, Snowden when
19 they had published their initial estimate report, that there
20 actually was the use of something called a Kriging method where
21 that use actually artificially inflated the amount of reserves
22 that were available, and, actually, your Honor, that's
23 ultimately what happened. Even Snowden itself has admitted
24 that they don't have in that mine what they thought there was,
25 and there's certain -- of the key veins in that mine, your

E4nQpreC

1 Honor, there are certain that are economically unfeasible. So,
2 the class period starts in our view, your Honor November 2012.
3 I think what's key is that we're talking about a dispute of
4 experts, as it were.

5 I think actually if you look at what Mr. Kramer said,
6 is that the preliminary estimate is done by Snowden. In
7 effect, thereafter, Strathcona takes the role as an auditor,
8 your Honor. They are the ones who are ultimately going to
9 audit these financials, and ultimately they are going to be the
10 ones that sign on to it.

11 What you have here, your Honor, is throughout the
12 period, you have Strathcona saying, hey, the numbers you're
13 giving out here, which they consistently say, here is a certain
14 sample, and this sample confirms the initial report, hey, the
15 numbers out here are not confirming the report. Your numbers
16 are -- as it were, to take it, the way you're crunching the
17 numbers here is inaccurate. You're going to come out with
18 ultimately numbers that do not substantiate what you've got.

19 So, it's tantamount, your Honor, we believe to have an
20 auditor at each quarter, your Honor, to say, hey, you know, you
21 guys are not calculating your financials properly ultimately,
22 and that there was a false statement.

23 So, there's a duty that arises each time you make
24 those statements is a duty to say -- had they said, these are
25 our numbers, our auditor, or here, Strathcona, where they

E4nQpreC

1 repeatedly in each statement, they said, they're doing the --
2 they're overseeing this process for us, they disagree with
3 these numbers. They actually think we don't have the -- we
4 don't have an economically feasible mine here. Had they said
5 that, there likely would not be a case, your Honor. But the
6 failure to disclose that dispute while pumping and promoting
7 the viability of this mine does lie at the crux of this case.

8 THE COURT: I have some follow-up questions. First
9 with regard to the period -- because the dispute couldn't have
10 arise until after Strathcona is retained. January, right?
11 There's probably a time period, and I don't know -- there's not
12 alleged in the complaint sort of when exactly it started. So
13 Mr. Kramer's point was May or June. Let's get back to the
14 November time period and the use of the Kriging, Multiple
15 Indicator Kreiging, whatever that is.

16 MR. LIEBERMAN: Yes.

17 THE COURT: Just with regard to the factual
18 allegations related to that, I just want to understand that
19 because the complaint says in paragraph 42, that it's the
20 statistical methodology and that it's considered non-standard
21 and challenging to apply, but that it appears in that same
22 sentence to indicate that it is a methodology that's used.
23 Then it also says it's used, and then it says, estimates for
24 operating mines.

25 So, my first question is, was that just a term that

E4nQpreC

1 was used in the complaint? In other words, my understanding of
2 this mine is that it wasn't an operating mine; and if it was
3 term that was specifically put in there because there's a
4 difference between using this methodology for an operating mine
5 as opposed to a mine that is preoperational, in other words, I
6 would say pre-commercial -- and I may be reading too much into
7 this -- is there a difference between the way that this
8 methodology is viewed for an operational mine as opposed to one
9 where they're basically doing, I'll use the term exploration,
10 although that's not the correct term. It's more of a factual
11 question. You may not know the answer to this.

12 MR. LIEBERMAN: Your Honor, I think the crux of it was
13 based on our discussions with experts and also analysts'
14 feedback that this Kriging methodology was not -- when you're
15 doing estimates for the capacity of a mine and their reserves,
16 this was not a standard method to use. So, operating versus --
17 making that distinction, I am not -- it could be we -- it could
18 be that's something that we got from our expert. I don't know
19 the answer to that offhand.

20 THE COURT: Sure. Focusing on that, because my
21 understanding is you're not alleging that it's something, in
22 other words, that is outside the pale. In other words, it's
23 non-standard. It's used. Maybe not used that often. I don't
24 know necessarily what percentage to put on it, but it's not a
25 methodology that is never used and, in fact, disfavored or

E4nQpreC

1 something like that.

2 The point I am getting at goes to with regard to that
3 statement, I don't see a scienter, the other side of it, the
4 scienter side of it. In other words, I don't see in the
5 complaint a statement that at a particular point in time -- at
6 almost any particular point in time, but even in the November,
7 December, January time period, that the defendants, either the
8 company itself or the individuals, had in their mind -- again,
9 whether it's the standard that Mr. Kramer was saying that it
10 was actually false or whether it's a reckless standard,
11 something less, I don't see an allegation in the complaint with
12 regard to that during that time period or even later because I
13 don't -- while Strathcona -- well, I will leave it at that.

14 I guess what I am looking for is within that time
15 period, as I understand the law, if this is supposed to be
16 their use of it is something that was improper and you're
17 alleging it was false because of the numbers they were putting
18 out, then there should be on the other side of it some scienter
19 allegation. I don't see that here.

20 MR. LIEBERMAN: Your Honor, we would argue that
21 defendants were aware that this methodology was unconventional;
22 that it did have the -- that it did have the impact of
23 inflating the quarter reserves and the viability of the mine,
24 and, therefore, when you make disclosures regarding the results
25 of that report, that it has to be properly vetted to investors,

E4nQpreC

1 and investors have to be apprized of what the risks are.

2 And we look at it also, your Honor, a little more
3 holistically, from the beginning of the class period through
4 the end that there is an effort really, your Honor, to -- the
5 company is -- their financial liability lies on this mine's
6 financial viability and the ability to economically feasibly
7 mine this area, and the inability to -- so, given that motive,
8 your Honor, we believe it starts from the beginning of the
9 class period through the end there's an effort to -- in order
10 to raise capital, in order to keep investor interest, in order
11 to explain to the market why there is this company called
12 Pretium that there is an effort to mislead investors.

13 THE COURT: I understand the motivation argument, but
14 are you saying the statement plus the motivation -- because
15 there's no allegation -- and, again, I don't know that Pretium
16 or the individual defendants understood what you say in
17 paragraph 42; that the methodology was non-standard. Even to
18 the point of saying that it's -- I'm not saying whether this
19 was sufficient or not, but it's common knowledge in the
20 industry that this methodology is something that is
21 non-standard and, therefore, not used, or something like that.

22 What I am trying to get at is for purposes of the
23 motion to dismiss, looking at just the complaint, I am trying
24 to find that scienter point. While I understand the motive
25 argument, in my mind I don't think it quite gets you there

E4nQpreC

1 inferentially with the way it's pled at this point in time
2 because I think, and you can correct me, from the November time
3 period until -- obviously they release periodically projections
4 between the November time period going forward, I guess,
5 through when Strathcona is retained; but am I correct that the
6 main allegation as it relates to that time period is that they
7 were utilizing methodology that was non-standard, was
8 challenging to apply and that, to use your terminology, was
9 basically turning out inflated numbers?

10 MR. LIEBERMAN: Your Honor, yes, the use of that
11 methodology, as well as just the publication of inflated
12 numbers, your Honor, those two twin allegations.

13 THE COURT: Let me ask you again. This is just by
14 what the words were in the complaint with regard to this. What
15 was the meaning behind challenging to apply? What does that
16 mean? In other words, I understand non-standard in the sense
17 that it means to the extent that it's used in the industry,
18 it's only used in five percent, ten percent, 20 percent, what
19 is less than majority or even more than that. I was just
20 wondering "what challenging to apply" meant? Is it just from
21 the perspective of the expert that it's very complicated and
22 difficult to utilize? I just didn't understand that. What
23 does that mean?

24 MR. LIEBERMAN: Your Honor, and I think because we
25 have a transcript here running, so I don't want to misstate

E4nQpreC

1 matters and assume that we can go back and correct it, so with
2 all those caveats, your Honor, the way we understand it, the
3 Kriging method does apply methodology where they take certain
4 spot samples in certain areas and they basically extrapolate.
5 They'll take a certain area, and they'll go a distance out and
6 take another area and see what the deposits are there, your
7 Honor, and there's an extrapolation of, well, because we got
8 this here and this here, we'll make certain assessments
9 regarding what's in between those, your Honor. We understand
10 there's usually -- in other methodologies, there's less
11 extrapolation and more actually digging into those areas to get
12 samples as to what actually occurred.

13 So that is my understanding as to either why (A) it's
14 both difficult to apply, and (B) as to how it has the impact of
15 inflating numbers, but, your Honor, we would prefer to have the
16 benefit of vetting that.

17 THE COURT: No, that's fine. As I said at the outset,
18 I completely understand that you don't necessarily have all the
19 facts at your fingertips and that that's going to await
20 briefing. This is really for me to now start getting my mind
21 around sort of what the motion may look like and also to give
22 you an opportunity to get a sense of where I have questions.

23 Is it fair to say that the statements that relate to
24 the projections and otherwise, do you dispute that those
25 statements are forward looking?

E4nQpreC

1 MR. LIEBERMAN: No, your Honor, we would dispute -- it
2 also depends which statements we're discussing.

3 THE COURT: Correct, I understand.

4 MR. LIEBERMAN: We would dispute they're forward
5 looking because, your Honor -- a statement is not forward
6 looking if it's a statement of historical fact. What Pretium
7 is doing is from the beginning of the class period through the
8 end of the class period, whether it's their initial resource
9 report or statements made from May onward, your Honor, they say
10 this is our sample, this is what we've got, and this confirms
11 our prior reports.

12 Nothing about that, your Honor, is forward looking.
13 It's actually historical. This is what we've received, and it
14 confirms the prior report.

15 So, therefore, we would argue that the statements are
16 not forward looking. And even if they were, your Honor, the
17 standard is that a forward-looking statement does have to have
18 proper cautionary language attached to it, and the proper
19 cautionary language here would be very specific. Your Honor,
20 our independent expert does not believe that these numbers
21 support our initial report, and they believe that actually this
22 mine is not economically viable.

23 Your Honor, had that statement been made throughout
24 the class period, and certainly from May onward, had that
25 cautionary language been utilized, your Honor, it may be a

E4nQpreC

1 different case. But that's not the case, your Honor.

2 So, (A) we don't believe these are statements of
3 historical fact. (B) the cautionary language here really did
4 nothing to alert investors to the true risk of the numbers that
5 were being presented.

6 THE COURT: I think there are two -- and I appreciate
7 that, and I appreciate your saying from May onward because
8 until Strathcona is there -- I assume that's the independent
9 expert you're referring to, is Strathcona?

10 MR. LIEBERMAN: Yes.

11 THE COURT: And they weren't retained until January.

12 MR. LIEBERMAN: That's correct.

13 THE COURT: So, even if Strathcona initially when they
14 signed the retention agreement started basically calling into
15 question the model, and there are no allegations in the
16 complaint as to that, that would at least mean it's not until
17 January where you have this sort of change, as it were.

18 Let me ask this: Assuming that the statements have
19 these nuggets of facts in them, so you're alleging they're not
20 forward looking, wouldn't they still be opinions?

21 MR. LIEBERMAN: Your Honor, would they be opinions?
22 Your Honor, when you're saying "this is the amount of gold
23 we've received," that's not an opinion.

24 THE COURT: But you're not disputing that that
25 statement is false? In other words, you're saying that

E4nQpreC

1 statement may be true, but the extrapolation that is done
2 because of that using this model, at least as I understand it,
3 is where you're saying the falsity of the statement comes in.
4 And, again, this is something for you to address more fully in
5 the papers. I guess what I am asking this: Do the factual
6 nuggets also take the statement in addition to -- if you're
7 correct on the law, taking it out of the realm of forward
8 looking, does it also take it out of the realm of being an
9 opinion.

10 MR. LIEBERMAN: Your Honor, it is our position we do
11 believe that these are not opinions. These are statements
12 being made saying this is what we received and this comports
13 with prior reports. These are very historical refined
14 statements made to investors. Even if it were, your Honor,
15 statements of opinion, these opinions have to be believed by
16 the issuer of those statements, your Honor. And also if there
17 are serious risks in that opinion, they have to be relayed to
18 investors.

19 So when you have very concretized opinions, there is a
20 standard to weigh whether or not there -- their investors were
21 probably warned this is just an opinion or there is really
22 information to give -- and all of this, your Honor is about
23 true transparency to the market and was -- when they were
24 issuing these numbers, was there true transparency to the
25 market? Your Honor, the allegations here we believe could

E4nQpreC

1 support conclusively, these were not.

2 THE COURT: Let me give you my sort of preliminary
3 view about -- and, believe me, I'm willing to be convinced
4 otherwise, but if it's an expert, and the expert is provided
5 with projections, in my mind, unless there is some reason to
6 take it out of that realm, and it may be the fact that the
7 statements themselves are so intermingled with current facts
8 that it takes it out of this realm, I don't know, but they seem
9 to be almost by definition opinions because how could they be
10 anything other than that?

11 That is sort of where my thinking is on this. This
12 is, again, only with looking at the complaint for purposes of
13 today, which is really just reading through it once and looking
14 at some of the case law, but that is an issue I would like both
15 parties to look at and address.

16 MR. LIEBERMAN: That's fine, your Honor, but, again,
17 it would be our position if it is an opinion, certainly the
18 basis for these opinions and the proper caution to these
19 opinions here is that there is a serious risk to the basis for
20 these opinions that the expert who is ultimately going to be
21 asked to sign on to these opinions is actually expressing a
22 contrary opinion, your Honor, contemporaneously, your Honor, we
23 think there would be no case law to support protecting such
24 statements.

25 THE COURT: I think we have dealt with sort of the

E4nQpreC

1 November 2012 time period. I don't see the scienter allegation
2 in there with regard to the use of the methodology. It seems
3 to me that that allegation -- is there anything other than,
4 again, use of the methodology up through the time that
5 Strathcona is retained as an expert -- and I understand that
6 during that time period they are disclosing projections and
7 other information, but as I read the complaint, what are the
8 other, I guess, places of -- because all of the projections I
9 think are based upon the Snowden use of the model. I don't see
10 the scienter allegations with regard to the defendants from
11 that November time period. I will do it in a more informal
12 allegations. Where are the scienter allegations in the
13 complaint from that November time period through the time
14 period of January? Let's start with that time period.

15 MR. LIEBERMAN: Your Honor, I think other than what
16 we've covered and briefly the fact that it was based on the
17 methodology, your Honor, that was known to inflate numbers,
18 your Honor, and was known not to be a customary use. Based on
19 the motive, because motive does such on scienter, motive of the
20 company to produce inflated numbers because if the company did
21 not produce numbers that showed this model was economically
22 feasible, Pretium would have no value, your Honor. Those are
23 the crux -- and publishing, generally, the scheme, your Honor,
24 from the beginning of the class period through the end, your
25 Honor, the scheme to publish false numbers and to consistently

E4nQpreC

1 promote them, your Honor, viewed, holistically, those are the
2 basis for those numbers. I don't have more to add at this
3 point.

4 THE COURT: OK. Mr. Lieberman, I will ask first with
5 regard to the complaint, and you may not know the second half
6 of the question, but when did someone from Snowden first begin
7 to raise issues about the projections?

8 MR. ROSEN: Someone from Strathcona, you mean?

9 THE COURT: Someone from Strathcona.

10 MR. LIEBERMAN: Your Honor, to give a precise date, we
11 don't have that at the moment, your Honor. It's really a
12 matter of an inference, and we do believe the inference --
13 because Strathcona's is a pretty blunt and straightforward
14 assessment that they did not believe that this -- that there
15 was never a point that they believed that the mine had the
16 ability to be economically feasible, your Honor. So that's one
17 point.

18 THE COURT: Let me stop you. With that last point,
19 are you saying that from the time they were retained in
20 January, that it's your understanding they expressed the view
21 that the mine wouldn't be as commercially viable as the
22 statements that the company was making?

23 MR. LIEBERMAN: Your Honor, certainly from when they
24 started reporting the samples -- and the question is whether or
25 not these samples do confirm or do not confirm Snowden's 2012

E4nQpreC

1 report -- the opinion of Strathcona from reading the article,
2 your Honor, we do believe in the case that they knew from the
3 outset they didn't believe this was economically feasible, and
4 they were consistently telling them to advise investors that
5 this was the case.

6 Your Honor, there is certainly a point where
7 Strathcona is obviously telling them we think you're giving
8 false numbers to investors. Actually, what they say, your
9 Honor, is at the end of the class period, they say, all the
10 numbers that have been issued in the class period have been
11 false. That's a statement by Strathcona at the end of the
12 class period.

13 THE COURT: Do they actually say false?

14 MR. LIEBERMAN: You know what, let's not use me as the
15 basis, your Honor.

16 MR. ROSEN: Misleading I believe so.

17 MR. KEHOE: Paragraph 60.

18 THE COURT: Erroneous and misleading. I see what
19 you're saying.

20 MR. LIEBERMAN: Statements include in all recent press
21 releases about the probable mineral reserves and future gold
22 production and the Value of Kings zone over a 22-year mine life
23 are erroneous and misleading.

24 Your Honor, the context for that statement is what we
25 learned after the class period from the interview with the

E4nQpreC

1 Strathcona person, the CEO of Strathcona, was they were telling
2 them that at several points during the class period, come clean
3 with investors. You have to tell the world.

4 THE COURT: Let me ask this: So, you interviewed
5 Mr. Farquharson, or however you pronounce it?

6 MR. LIEBERMAN: I didn't interview him. There was an
7 article.

8 THE COURT: It was just the article. I was going to
9 ask whether you interviewed him.

10 MR. LIEBERMAN: We haven't had -- not yet, your Honor.

11 THE COURT: I assume there was a contract with the
12 company, and so there may be a reason why that couldn't happen?
13 Do you know? I don't know whether that's the case, but, you
14 know, contractually he may not be able to do that absent
15 consent from his former client, but I'm just in part wondering
16 because obviously while an article is very helpful, speaking to
17 him would be something different. I understand that is
18 something you have not to date been able to do.

19 MR. LIEBERMAN: Your Honor, we have been unable to
20 interview Farquharson at this stage.

21 THE COURT: In other words, because you have tried and
22 been unable to? In other words, he hadn't agreed to interview
23 with you or you haven't tried?

24 MR. LIEBERMAN: Your Honor, for the purposes of
25 stating on the record, we have not interviewed him. I don't

E4nQpreC

1 want to say anything further.

2 THE COURT: OK. Again, I don't want to go too far
3 afield. Sometime my curiosity gets the best of me.

4 MR. LIEBERMAN: There is certainly a point, your
5 Honor, in August of 2013 where Pretium changes the course of
6 how they're going to do their drilling and sampling.
7 Basically, what it has learned is that they find the Cleopatra
8 vein, and they decide, hey, we've got some good stuff here,
9 let's drill down. That was not the initial plan, your Honor.
10 They say, let's continue to drill down. What they say is that
11 Strathcona was on board with that change, with that change in
12 the drilling plan. So Strathcona though reveals that it was
13 never on board. They didn't agree with that and ultimately
14 they didn't agree with the whole process.

15 So, certainly you have at that point where that change
16 is made, a statement is made that Strathcona is on board with
17 that change in plan, and Strathcona's ultimate clarification
18 that they were never on board with it, you are certainly
19 getting by August 1 a critical period where there is certainly
20 knowledge, but we think, your Honor, the inference is that it
21 starts from the beginning of the period -- with respect to
22 Strathcona's objections, certainly by May when they start to
23 issue the initial results and say that it supports the Snowden
24 report of 2012.

25 THE COURT: I see that with regard to the Strathcona

E4nQpreC

1 statements that you can draw an inference that at some point at
2 that point, and I assume you are saying at the point when they
3 resign or some point before that, that they started raising
4 these issues; that as they're heading out the door, they send
5 them a letter which, I guess, probably outlines some of the
6 things that are contained in paragraph 60.

7 I can see where you can argue that there is an
8 inference that, therefore, the defendants knew that the
9 statements were false inferentially. I don't think that is
10 explicitly stated in the complaint that based upon these
11 statements, you can infer that. It certainly doesn't say a
12 warning that they were reckless, whatever the standard is. It
13 may be that the inference is all that's necessary, you know, in
14 that time period.

15 MR. LIEBERMAN: Your Honor, we have a statement saying
16 we told them on several occasions they should be alerting the
17 world the resource model is not panning out.

18 So, there is a period, your Honor, where obviously it
19 has to not pan out before that conclusion has arisen. I think
20 the inference is certainly the case that there's a reason why
21 Pretium decides to change the course of their bulk sampling
22 program and dig deep down in Cleopatra. Strathcona discusses
23 that that was a change that was made, and certainly by that
24 stage and before that stage, they realize, hey, if we don't do
25 that, we're not going to get good results in our bulk sample

E4nQpreC

1 report. The only way we can do that is by drilling down.

2 So, your Honor, I think that is an inference that
3 there is a change. The fact is we don't know when Strathcona
4 started saying alert the world. The question is when does that
5 inference apply, your Honor? Strathcona is so forceful in its
6 statements after the class period, bot in its resignation and
7 its subsequent interview by Farquharson, it was a pretty strong
8 opinion that it was never panning out, your Honor. So, we
9 believe those statements are coming out false from the outset
10 or certainly from the time results are being made.

11 There is a reason why, your Honor, the plan of the
12 bulk sampling drilling changes. So, the question is, how does
13 that fit into the pleading? What is the inference? We think
14 the inference is that the theme is that they weren't getting
15 the numbers, they weren't disclosing that to investors, and
16 they decided, hey, we'd better drill down to get something to
17 justify the feasibility of this mine.

18 THE COURT: Let me ask this, and this is for both
19 parties, I think.

20 Does it matter here from a legal standpoint that what
21 you have is one expert using the model saying here are the
22 projections. You have another expert saying, well, no, we're
23 seeing these samples, and you know what, we don't agree with
24 that. We think that's wrong.

25 For the purposes of determining sort of the

E4nQpreC

1 defendant's state of mind at the time -- I guess what I am
2 asking is, are there cases where you have this situation where
3 you have experts on either side, you have the defendant hearing
4 from both experts, and where that leads me as I'm looking at
5 the allegations in a complaint on a motion to dismiss or even
6 outside of that. Because I'd like to see cases that -- because
7 I won't say this is an unusual, but it's a unique case where
8 you have a situation where the -- because although I understand
9 your motive argument, right, and it may be that there's a
10 requirement that they get another expert to come in, but
11 they've brought Strathcona into the mix, right? And as you
12 mention, certainly the principal of Strathcona seems to be
13 someone who is pretty plain-spoken and pretty direct, at least
14 in his interview, right? So, if they knew that going in and
15 they hire him nonetheless?

16 In other words, what I'm saying is your motive
17 argument is based on the fact that they had an idea using this
18 methodology that it would inflate the numbers, but then they
19 bring somebody in who apparently can debunk that. So it's a
20 little bit of a counterargument what their motive is. In other
21 words, that doesn't seem to make sense if their motive was to
22 inflate them.

23 MR. LIEBERMAN: I think, your Honor, we would take
24 issue with the characterization this is just to dueling
25 experts. What happens is certainly by January 2013, there's

E4nQpreC

1 only one expert, your Honor. That expert is Strathcona. That
2 expert is going to be the one that issues the report, the final
3 report, that tells investors what they have here; and that is
4 going to be the report that confirms the 2012 report.

5 You're not going -- ideally, they wouldn't have
6 Snowden go ahead and confirm their own report because there's a
7 certain element of bias there. So they hire an independent
8 expert. They taut that expert throughout the period. So, from
9 the period of when Strathcona comes in, there's only one
10 expert, your Honor. That's Strathcona.

11 So, it's not just that, well, we have dueling experts,
12 and I take this expert's opinion over this expert's opinion.
13 That's an incorrect, your Honor, respectfully,
14 characterization. There's one expert. That expert is telling
15 you, this mine is not economically feasible.

16 So, that's a very important point, your Honor, when
17 they're telling investors that this is what we have and it's
18 confirming the Snowden report. Then they're saying in the next
19 sentence, your Honor, and, by the way, Strathcona is the one
20 that is overseeing this program, and they are going to be the
21 ones that sign on to the report, your Honor. Your Honor,
22 that's a false statement. That's giving investors a false
23 impression as to the nature of what's in the mine.

24 Importantly, when they make a statement in August 2013
25 Strathcona is on board with the change of the plan of the

E4nQpreC

1 drilling, your Honor, that's incorrect. That's completely
2 factually incorrect. They were never on board. The only
3 reason they continued to go down is because they weren't
4 getting the numbers, and they had Strathcona there, an expert,
5 their only expert, is tantamount to having your only auditor
6 say the books here, you do not have the revenues you think you
7 have. Stop reporting these incorrect revenues. That's what we
8 have here.

9 I'm not sure we have dueling experts. Snowden is
10 supposed go into the background, your Honor, but they never do
11 go into the background ultimately they've got to pull them in
12 at the end of the day. Significantly, your Honor, at the end
13 of the class period, those numbers turn out to be -- Snowden's
14 numbers turn out to be far less than actually was initially
15 published. So even Snowden had to back off. You don't have
16 dueling experts throughout the class the period. Snowden
17 itself admits, hey, these numbers are lower. The grades are
18 lower. The grades on three of the key five veins are
19 economically unfeasible, your Honor. And they're less than
20 five grams per ton, and at 20 percent less than was announced
21 by Pretium.

22 So, your Honor, I don't think we have dueling experts
23 here. Actually, what you have is, you have an expert that did
24 is the task, and supposedly had left the scene. Strathcona
25 comes in and never signs on and says these numbers are false.

E4nQpreC

1 They're not supporting numbers. This is economically
2 unfeasible, and ultimately you have that same expert saying,
3 you know what? Strathcona was right. Your Honor I don't see
4 dueling experts I see one expert that turned out to be right,
5 Strathcona, and only one voice over the relevant period, your
6 Honor.

7 THE COURT: I'll hear from Mr. Kramer.

8 MR. KRAMER: Thank you, your Honor.

9 Your Honor, none of that is in the complaint because
10 he couldn't allege it consistent with Rule 11. Snowden is the
11 only expert responsible for the estimate. Snowden is the
12 expert that remained on the scene throughout the entire period,
13 and Snowden is the expert that remains with the company to this
14 day. So, the notion that Snowden has somehow left the scene is
15 not a fact that they could allege consistent with Rule 11.
16 It's just not true.

17 Strathcona came in for a bulk sample project, and you
18 did have dueling experts. Strathcona to this day stands behind
19 its resource expert to this day and has not backed away. You
20 are right, it is an interesting case where you have one expert
21 responsible for an estimate continuing to this day to say I
22 gave the right estimate and have another expert who came in to
23 do a bulk sample saying we think their methodology is wrong.
24 You have a company who has to figure out which one to go with.
25 It's simply not a securities fraud case when you have those

E4nQpreC

1 factors.

2 If you think of Twombly, the Supreme Court's decision
3 in Twombly where the Supreme Court said, you have to have not
4 only a plausible theory of the case, but your theory of the
5 case has to be more plausible than the other guy's theory.
6 Here, I submit, where you have the expert responsible for the
7 estimate continuing to this day to say this is a valid
8 estimate, it's very, very hard to allege that the defendants
9 not only knew the estimate was wrong because there's no facts
10 here to show it was wrong, but that they believed it was wrong
11 at the time they made the statements.

12 I think your Honor questions are exactly right, where
13 in the complaint, which has to be pled with specificity, do
14 they allege, this is the first time that the defendants knew or
15 were told by Strathcona that Strathcona disagreed with the
16 resource estimate? It's not in the complaint, and it's not in
17 the complaint for a good reason, because Strathcona didn't even
18 start the work that led to the disagreement until May 28,
19 drilled the first hole. Strathcona didn't get the first
20 results until sometime thereafter, and it's only that set of
21 facts that led to the disagreement. And even then to say that
22 the defendants must therefore go with the expert that disagreed
23 with your principal expert, OK, they have a disagreement,
24 that's fine. That's not fraud. These far from fraud.

25 So, I think the questions are correct: Where in the

E4nQpreC

1 complaint is there a factual allegation that my clients were on
2 notice that Strathcona disagreed, and even then what you have
3 is a disagreement; you don't have knowledge of objective or
4 subjective falsity. I think that is a large part what the
5 motion is going to be about.

6 THE COURT: OK. Mr. Lieberman, I have a question, and
7 it may be that Strathcona has never opined on this. It relates
8 to the actual model itself that was referenced in paragraph 42.

9 I didn't see anything in the complaint, but did
10 Strathcona either in the complaint or otherwise, in
11 statements, take issue with the methodology before they had
12 started doing the sampling? In other words, you could imagine
13 a situation -- and this is me, again, just talking -- where
14 they get retained. They say can you provide us with the
15 information that the other expert has put together, and they
16 look at this model, and they say, how could you guys possibly
17 use this model? This doesn't make any sense. What I'm trying
18 to do is get at the use of the model. Do you have any sense
19 that at some point Strathcona or someone else expressed that
20 view and actually expressed that view to the defendants? The
21 first part is what I'm interested in, but either, you know, if
22 yes, then do you have any idea whether they expressed that view
23 to the defendants?

24 MR. LIEBERMAN: Your Honor, the allegation comes from
25 any discussion with our expert, your Honor, and also from the

E4nQpreC

1 Farquharson's interview which comes after the class period.

2 The claim, your Honor, the allegation is that given
3 that you, Pretium, are the experts, they are certainly a
4 company that focuses on mining and they understand what the
5 difference between the Kriging method is and other method is,
6 and they understand the consequences of using that, your Honor,
7 and using a method that is not standard industry use. So that
8 is, your Honor, the basis.

9 We don't have, your Honor, an allegation saying that
10 Strathcona told them at X point, no, you should not have used
11 Kriging. That allegation is not in the complaint.

12 THE COURT: Then I think as you are putting papers
13 together because I'm not sure -- let's assume that you just add
14 a paragraph, and the paragraph says that it was common
15 knowledge in the industry and, therefore, to these defendants
16 that this was a non-standard methodology. Does it meet the
17 standard? In other words, once they use that, is that
18 reckless? And to Mr. Kramer's point, because I think he is
19 saying these opinions are forward looking and the standard is
20 higher, so you have to either show objective and subjective
21 falsity or you have to show that there was a belief that use of
22 this basically was creating false information or false results.

23 I guess what I am saying is that if there is that sort
24 of information out there either because I understand the
25 argument that Strathcona came in, they did the sampling and

E4nQpreC

1 they said, you know -- this is me talking, they may have said
2 it in a different way -- these samples do not support the
3 results that Snowden came up with using that model, and I
4 understand that, but that only comes at a certain time period,
5 I guess.

6 My question is whether prior to that you have
7 information that Strathcona questioned the use of the
8 methodology because it was non-standard or something like that,
9 or raised some issues with the defendants about that.

10 MR. LIEBERMAN: Your Honor, there is currently no
11 allegation as to Strathcona raising the point prior to
12 January -- prior to May regarding the Kriging methodology. So
13 that's something that if we have something, then we would
14 consider amendment; but, if not, we'll stand on the pleadings.

15 THE COURT: I want to talk now a little bit about the
16 individual defendants, and then I will move to the issue of
17 allegations relating to damages, which is something I don't
18 think Mr. Kramer necessarily raised in his papers but I want to
19 raise because, again, I don't want to be in a position where we
20 go through everything and then there is an allegation that --
21 in other words, where we do more than one amendment to the
22 complaint.

23 I understand there to be allegations as to the
24 individuals as relates to control, you know, their position,
25 the fact that this apparently was one of or the only project

E4nQpreC

1 that they had. But doesn't there need to be some allegation of
2 culpable participation or are you arguing that what you've
3 stated here, the combination of their positions and the fact
4 that this was the sole thing they were focused on, that that is
5 sufficient for pleading purposes?

6 MR. LIEBERMAN: Your Honor, we'd argue that when you
7 have a situation where the company's entire viability relies on
8 results coming out of this mine and this bulk sampling report,
9 this is a most significant matter for the company. The
10 allegation is that Strathcona was raising issues, was alerting
11 them that the numbers they were advising investors and that the
12 sampling did confirm the 2012 report, and that was the
13 entire -- that was the entire import of the company, your
14 Honor. We had those statements, your Honor made by -- we had
15 the executives of the company, the CEO, the CFO, people who
16 were involved in the operations, your Honor, we would say
17 there's no way they are not aware of those concerns being
18 raised by Strathcona. The only plausible inference, your
19 Honor, would be is that they were advised of those concerns and
20 understood what concerns ultimately led to Strathcona's
21 resignation.

22 THE COURT: I think I have a couple of points with
23 regard to the briefing. Are there any cases where that is sort
24 of enough? In other words, where you have a situation where
25 either it's the only thing the company does or they've been

E4nQpreC

1 tasked to look after that particular project, so, similar to
2 the defendants here, and that combination has been found to
3 amount at any point in time to either a motion to dismiss,
4 motion for summary judgment, what have you, to culpable
5 participation for those individuals?

6 MR. LIEBERMAN: Your Honor, we would argue it's not
7 only culpable participation, but it's even for a primary
8 violation, your Honor, it does lead to scienter. We do not
9 believe the Second Circuit requires that we have a verbatim
10 quote from Strathcona to Mr. Quartermain saying your numbers
11 don't match. There's an inference of plausibility that goes,
12 your Honor, quite frankly, both ways. It's implausible that
13 Quartermain and the CFO did not know that Strathcona was
14 raising issues regarding the viability, the economic
15 feasibility of company's only mine.

16 THE COURT: With that, again, I've looked at some of
17 the cases, but does the actual culpability need to be more
18 individualized than that? I am not saying it necessarily
19 would, but you could imagine a situation where you have these
20 press releases, but also concurrent with that or certainly
21 after that, you have the president answering questions of
22 analysts or something like that, so you have the actual
23 statements of that individual as evidence of their
24 participation. That may be the cleanest, or there may be other
25 gradations, and I do understand that even in this district when

E4nQpreC

1 it comes to culpable participation, there may not be a hundred
2 percent agreement among the other judges concerning that, but I
3 want you to explore that.

4 And you know what? To the extent that you feel that
5 there are cases even outside of this district that speak to it
6 because you can't find something directly on point here, I
7 would invite both parties to look to that because this is an
8 area that I think -- my sense is that it is not as well settled
9 as some of the other things that we have been talking about.
10 Again, that is my sense at this point without having really
11 jumped in with both feet on this.

12 Now, damages. What's the theory of damages here? By
13 that I am saying, is loss causation based on corrective
14 disclosure materialization of a risk? What actually is the
15 theory under which you are pursuing the loss here, the damages?

16 MR. LIEBERMAN: Your Honor, both, your Honor, we think
17 the resignation of Strathcona certainly causes the stock price
18 to drop on October 9, 2013, your Honor. We think that is
19 certainly materialization of the risk that Strathcona all along
20 believed that the numbers of the representations made by the
21 company was false and they ultimately say two weeks later that
22 is why they resigned. Ultimately, also in October of 2013 when
23 they resigned, they say all of the prior press releases of the
24 company were false, and, your Honor, that's a disclosure.
25 Falsity of the stock thereafter also was dropped, your Honor.

E4nQpreC

1 So, your Honor, really if you think of an analyst's
2 understanding of this information and also how scholars -- and,
3 you know, the difference between materialization of risk and an
4 actual corrective disclosure is a very fine line, your Honor.
5 It's really marketing -- learning information that it hadn't
6 known otherwise, your Honor, and that occurs in both instances,
7 both of the alleged partial corrective disclosures.

8 THE COURT: I would say just in what I was thinking
9 about this before coming on the bench, the resignation, I don't
10 see quite how that is necessarily a corrective disclosure
11 because there is no -- in other words, with regard to the false
12 statements that you've alleged, it's not connected necessarily
13 to that, and I at least saw one case where there was a
14 resignation by board members, I think -- and I think it was an
15 allegation of corrective disclosure where the allegation was,
16 well, that's not enough. It doesn't go to what the underlying
17 falsities were which related to something like accounting
18 improprieties or something like that.

19 I would like when you look at it -- you know, you
20 didn't say that for loss causation. You mentioned it in
21 materialization of the risk. I would like to see cases,
22 actually, because I had a spirited conversation with my law
23 clerk before we came out about this issue, about whether the
24 resignation is something that would fall within materialization
25 of the risk. And, in fairness, I didn't look at enough cases

E4nQpreC

1 to get a sense of that at all. So, when you -- I trust that
2 since I'm raising it out now, Mr. Kramer will raise the issue
3 in his papers.

4 MR. KRAMER: We will, your Honor, yes.

5 THE COURT: In part because I really do want to, you
6 know, if there is going to be an amendment, to take care of
7 everything at once.

8 I do understand, actually, Mr. Lieberman, the comment
9 about the statements later because you have to understand that
10 the statements you have that are made by Strathcona in the
11 article are actually outside the class period, but as I
12 understand what you're saying is that those statements, you can
13 basically infer that they, being defendants, were told about
14 each of those things during the class period, basically.

15 So, I think the class period ends on the 21st. The
16 statements are on the 22nd. But I understand what you're
17 saying, I think, is that that goes to -- you know, clearly that
18 the defendants knew because Strathcona basically said in the
19 statements we told them repeatedly before this.

20 MR. LIEBERMAN: Right. I mean, your Honor, the
21 October 22, 2013 statement regarding falsity bears directly on
22 the resignation letter of October 9, 2013 when they resign.
23 So, to somehow -- that these are two separate instances or one
24 is a corrective disclosure and one is not, your Honor, they
25 bear directly on the method, your Honor. First, they resign

E4nQpreC

1 and then Pretium decides to disclose why they resigned, your
2 Honor, it's similar to -- and there are certainly cases, your
3 Honor, that have held that a resignation or a resignation
4 here -- it could be of an auditor, it could be a resignation of
5 a CEO, a resignation of any type of personnel -- can be the
6 first time that that is alerted that there's something wrong,
7 and that get baked into the stock price, your Honor, and it
8 thereafter comes out -- typically disclosures don't come, your
9 Honor, in one full clean -- Enron didn't collapse by the CEO
10 getting up and saying our statements have been false for the
11 past eight years. There's a series of disclosures at several
12 times, your Honor, and that's the same thing that occurred
13 here.

14 THE COURT: Although it was a pretty dramatic collapse
15 for the employees themselves.

16 MR. LIEBERMAN: It certainly was, your Honor, but it
17 didn't occur from one statement.

18 THE COURT: From one day, that's correct.

19 I think that's all the questions that I have. I will
20 give both parties an opportunity to raise any issues they want
21 to raise to me now and then we can discuss -- I don't know
22 whether you've discussed with each other a schedule for
23 briefing. If you would like to take a few minutes to do that
24 and then propose something, that's fine. If you've done it
25 already, I'll hear from you.

E4nQpreC

1 MR. KRAMER: Your Honor, in fact, we had a schedule
2 with Judge Gardephe that then it came to your Honor, and you
3 revised the schedule to tighten it up a bit. The current
4 schedule we have, I believe, your Honor, is -- yes, there is a
5 letter dated February 14, 2014 from the Pomerantz law firm.
6 It's filed February 18 with a proposed schedule. I believe
7 your Honor handwrote different dates on here. So I will tell
8 you the current dates we have. We are prepared to move forward
9 on it, and we will obviously try to expedite as much as we can
10 the transcript from today which was very helpful, but the dates
11 we have currently are May 5 for the defendant's brief. The
12 opposition June 16; and then the reply July 14.

13 THE COURT: Look, I probably wrote it. No question I
14 wrote it, but I also raised some issues here today. So, if the
15 parties want a little more time -- rather than give you more
16 time and you're add able to address this adequately than not,
17 but if that briefing works for the parties, then --

18 MR. LIEBERMAN: Your Honor, I think in light of the
19 fact that it appears that your Honor is inclined to have this
20 as the last and final, one motion to dismiss to ruled upon, and
21 thereafter not allow for any other amendments, we propose that
22 we give, your Honor, 60 days to respond to the motion to
23 dismiss. Within that time period, your Honor, we will alert
24 the Court whether we intend to amend or not.

25 THE COURT: OK. 60 days for defendant to put in their

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1 brief? I'm sorry, I'm not sure I follow. 60 days for the
2 whole briefing schedule?

3 MR. LIEBERMAN: 60 days from the time that we
4 receive--

5 THE COURT: I see. For you to be able to respond.

6 Mr. Kramer, you heard what Mr. Lieberman wants; he
7 wants 60 days from the time you file your brief, to either
8 submit his brief or, as I understand it, to indicate to the
9 Court an intention to amend.

10 And before you say anything, Mr. Kramer, I just want
11 to make sure that I -- I want to be perfectly clear. What I am
12 saying with regard to amendments is that with regard to issues
13 that Mr. Kramer has raised or I've raised here, that with
14 regard to those, it would be an uphill battle for you to seek
15 leave to amend if we go through the motion to dismiss there.

16 If there were areas that no one had raised prior to
17 that, I would obviously entertain the motion, but that's a
18 different situation where you haven't been put on notice of a
19 deficiency, and it's something that neither -- that no one has
20 noticed, I view that in a different place.

21 So, I don't want you to think that I would preclude
22 you. In fact, I don't want you to think in either situation,
23 you always have the ability to apply to me to amend. What I'm
24 saying to you, the bar is much higher for issues that we sort
25 of vetted here today. That's what I'm saying. I don't want

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1 you to not then seek leave to amend thinking that I was
2 basically precluding you in some way.

3 MR. LIEBERMAN: Understood, your Honor. We would
4 still request the 60 days.

5 THE COURT: That's fine.

6 MR. KRAMER: Your Honor, can I then based on this
7 conversation, we would like just a little bit more time because
8 we would like to get the transcript and really focus on your
9 Honor's questions to make sure we have done it.

10 THE COURT: That's fine.

11 MR. KRAMER: So, currently our brief is due May 5. We
12 would propose that it be due May 19, to give us two extra weeks
13 just to go through it.

14 Plaintiffs opposition or amendment, whatever they
15 choose to respond, July 19. That's two months, if that works.

16 And then our reply, I would propose to be August 21,
17 although I don't know if that is a weekday --

18 THE DEPUTY CLERK: August 21 is a Thursday.

19 MR. KRAMER: May 19, July 19, August 21 is what we
20 would propose if that's OK with the Court.

21 THE COURT: Mr. Lieberman?

22 MR. LIEBERMAN: That's fine, your Honor.

23 THE COURT: OK. Once I get the papers, I will
24 determine whether oral argument is going to be necessary.
25 Basically, the way I envision any oral argument, it will be

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1 similar to today. I will come with questions that I have based
2 upon the papers. If possible, if time permits, I will try and
3 give you some direction before we appear so you can give some
4 thought to the questions. I may not be able to do that, but I
5 will attempt to do that. So you don't have to come prepared
6 with a spiel "May it please the Court, yada yada yada." That's
7 going to be the first time I'm yada yada will be on the record.
8 So if that schedule works, we will put that in a minute entry
9 for today's proceeding.

10 Is there anything else?

11 MR. LIEBERMAN: Further on behalf of plaintiffs, your
12 Honor, nothing else.

13 MR. KRAMER: Nothing for defendants, your Honor.
14 Thank you.

15 THE COURT: I am going to mention something which I
16 don't believe has an impact one way or another, but I do so
17 just to mention it. When I was in private practice, I believe,
18 Mr. Kramer, we may have been co-counsel on a case. You
19 probably don't remember.

20 MR. KRAMER: Now I'm embarrassed.

21 THE COURT: That's OK. It was a case involving one of
22 my partners, who was a lead partner, Greg Danilow.

23 MR. KRAMER: Now I know the case.

24 THE COURT: I just mention it. It was, again, I think
25 it was co-counsel, although I don't remember. This was years

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1 ago. I don't believe it requires any basis, but just for
2 purpose of full disclosure, I wanted to let all parties know
3 about it, and to remind Mr. Kramer.

4 MR. KRAMER: Thank you, your Honor.

5 THE COURT: If there is nothing else. We will stand
6 adjourned.

7 (Adjourned)